[redacted]

SUPREME COURT OF THE UNITED STATES

[redacted]

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

WALTER S. KAISER.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 401.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WALTER S. HARSHA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Nos. 437, 438.

United States circuit court of appeals, sixth circuit.

THE UNITED STATES OF AMERICA
vs.
WALTER S. HARSHA.
} Error to the district court for the eastern district of Michigan.

This cause coming on to be heard, was argued and submitted to the court, whereupon, the judges of the court being in grave doubt as to certain questions of law arising therein, it was ordered that the same be certified to the Supreme Court for its instruction thereon with a proper statement of facts as follows, to wit:

Statement of facts.

Walter S. Harsha was duly appointed clerk of the circuit court of the United States for the eastern district of Michigan June 6, 1882, took the oath of office and filed his official bond in the sum of twenty thousand dollars on the same day, and is now and has from that time until the present been continuously under said appointment by the judges of said court, and with their continued assent and approval, acting as clerk of said court under a bona fide claim of title to said office, no other person having at any time made any claim of title thereto, nor has his title been otherwise questioned than as hereafter stated.

The said Harsha is now, and has been continuously since his appointment as clerk, a permanent resident of the city of Detroit, in the eastern district of Michigan, where his official duties as such clerk are to be performed, and has during the whole of said time, from June 6, 1882, to the date hereof, given his actual personal attention to such duties, and has not at any time removed from said district.

The accounts of Harsha as such clerk for the first quarter of the calendar year 1895, amounting to $482.90 were made, presented, proved, and allowed by the circuit court of the United States for the eastern district of Michigan as provided by law; said accounts were for services actually rendered, and were correct, and were duly forwarded to the Attorney-General for examination under his supervision, as provided by statute.

2 The said Harsha was duly appointed clerk of the United States circuit court of appeals for the sixth circuit, June 16, 1891, took his oath of office and filed his official bond in the sum of twenty thousand dollars on the same day, and continued to perform the duties of the office of clerk of said court from June 16, 1891, aforesaid, to and including October 2, 1894, and received salary as such clerk at the rate of $3,000 per annum for that time.

On February 24, 1894, Harsha presented to the judges of said court of appeals his resignation as such clerk, which resignation was accepted by said judges October 2, 1894.

Upon the presentation at the Treasury Department of the said accounts so forwarded to the Attorney-General, the Comptroller of the Treasury, upon his construction of the act of Congress of July 31, 1894, decided that a vacancy occurred in the office of said clerk of the circuit court of

the United States beginning August 1, 1894, for the reason that after that date Harsha continued to hold the office of clerk of the United States circuit court of appeals for the sixth circuit, the annual compensation of which office was $3,000, and that such vacancy continued thereafter until the expiration of said first quarter of the calendar year 1895, and, upon the ground of such vacancy, disallowed the said accounts of petitioner as clerk of the United States circuit court for the eastern district of Michigan for the said first quarter of the calendar year 1895.

This action was brought by Harsha to recover his fees earned as clerk of the circuit court in the district court of the United States for the eastern district of Michigan under the second section of the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the Government of the United States," and after making a finding of facts and stating its conclusions of law, the district court filed the same and entered judgment for the petitioner Harsha in the sum of $482.90. The United States, by its attorney, then applied to the district judge, holding the district court for the allowance of a writ of error from this court to the district court. The writ was allowed and was issued by the clerk of this court to the district court.

The instruction of the Supreme Court is respectfully requested on certain questions of law arising on the foregoing statement of facts as follows, to wit:

First question:

Can such a judgment rendered under the act of March 3, 1887, in the circuit or district court be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal?

Second question:

Did the act of July 31, 1894, above referred to ex proprio vigore create a vacancy in the office of clerk of the circuit court for the eastern district of Michigan by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals of the sixth circuit?

3 Third question:

Does the general rule that officers de facto may not recover by suit compensation for services rendered as such apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power under a bona fide claim of title to the office when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formally to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification?

WM. H. TAFT,
HORACE H. LINTON,
GEO. R. SAGE,
Judges sitting in Circuit Court of Appeals.

MAY 24, A. D. 1897.

4 United States circuit court of appeals for the sixth circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America v. Walter S. Harsha, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate was by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at the city of Cincinnati, Ohio, this 22nd day of June, A. D. 1897.

[SEAL.] FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

(Indorsed on cover:) Case No. 16614. Term No., 401. The United States, plaintiff in error, vs. Walter S. Harsha. Certificate. U. S. circuit court of appeals, 6th circuit. Filed June 24, 1897. Supreme Court, U. S. Clerk's office. Received Jun' 24, 1897.

No. 127.

Brf. of Atty. Gen

for

U. S.

Filed Oct. 3, 1898.

Office Supreme Court, U. S.
FILED
OCT 3 1898
JAMES H. MCKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1898

THE UNITED STATES, PLAINTIFF in error,
v.
WALTER S. HARSHA, DEFENDANT in error.

No. ~~491~~ 127.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFF in error,
v.
WALTER S. HARSHA.
} No. 401.

BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error, Walter S. Harsha, was duly appointed and qualified as clerk of the circuit court of appeals for the sixth circuit on June 16, 1891, which office he continued to fill until October 2, 1894, when his resignation was accepted, he receiving for his services during the said period the statutory salary of $3,000 per annum.

At the time of his appointment as such clerk of the circuit court of appeals, and long prior thereto, he was occupying the office of clerk of the circuit court of the United States for the eastern district of Michigan, being a permanent resident of the city of Detroit, and continued to act as such clerk of the circuit court with the assent

and approval of such court up to May 24, 1897, the date of the certification of the case to this court.

On July 31, 1894, Congress passed an act (2 Supp. R. S., 212, sec. 2) prohibiting any person holding an office, the salary or annual compensation of which was $2,500 per annum, from holding any other office.

The accounts of said Harsha for services as clerk of the circuit court of the United States for the eastern district of Michigan for the first quarter of the calendar year 1895, amounting to $482.90, were made, presented, approved, and allowed by the circuit court of the United States as provided by law, and were duly forwarded to the Attorney-General for examination as provided by the statute; but upon presentation at the Treasury Department of the said accounts so forwarded to the Attorney-General, the Comptroller of the Treasury contended that a vacancy occurred in the office of said clerk of the circuit court of the United States, beginning August 1, 1894, by reason of the act of July 31, 1894, *supra*, as after that date Harsha continued to hold the office and to receive the salary of clerk of the circuit court of appeals for the sixth circuit, the annual compensation of which office was $3,000, and that such vacancy continued thereafter until the expiration of said first quarter of the calendar year 1895; and upon the grounds of such vacancy disallowed the accounts of petitioner as clerk of the circuit court of the United States for the district of Michigan for the said first quarter.

Thereupon suit was brought by said Harsha under the act of March 3, 1887 (1 Supp. R. S., 559), entitled "An

act to provide for the bringing of suits against the Government of the United States," to recover the sum of $482.90, being the fees earned by him as clerk of the circuit court of the United States for the eastern district of Michigan for the first quarter of the calendar year 1895. The district court, after making a finding of facts and stating its conclusions of law, entered a judgment for the petitioner in the sum of $482.90. From this judgment a writ of error was sued out by the Government from the circuit court of appeals, which writ was duly allowed and issued.

Upon the foregoing statement of facts the three questions hereinafter respectively set forth were certified by said circuit court of appeals for the instruction of this court thereon.

ARGUMENT.

FIRST QUESTION.

> Can such a judgment, rendered under the act of March 3, 1887, in the circuit or district court, be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal?

The practice obtaining for the review of judgments of the circuit and district courts under the act of March 3, 1887 (1 Supp. R. S., 559), was uniformly that of appeal from the creation of this jurisdiction in the circuit and district courts over claims against the Government until the decision of this court in the case of *Chase* v. *The United States* (155 U. S., 489).

Section 9 of the act of March 3, 1887, *supra*, which gave to the parties suing in the circuit and district courts "the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made," was held by this court in *United States* v. *Davis* (131 U. S., 36, 39) to mean "the right of appeal reserved in the statutes relating to the Court of Claims, and as that right could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the district or circuit courts of the United States under said act."

In view of the foregoing decision, and because *all* judgments of the Court of Claims are taken to the Supreme Court by appeal, whenever it was deemed necessary by the Government to have the judgments of the circuit and district courts reviewed in claims cases the procedure was by appeal, and jurisdiction was uniformly taken therein by the circuit courts of appeals and by this court until the decision of the circuit court of appeals for the fourth circuit in the case of *United States* v. *Fletcher* (60 Fed. Rep., 53), where an appeal was dismissed on the ground that the method of review should have been by writ of error.

Somewhat later the case of *Chase* v. *United States* (*supra*) was decided by this court, wherein it was held that the position of the Government that cases under this act should be brought to the reviewing court by *appeal only* was not well founded. In consequence of this decision a writ of error was sued out from the circuit court

of appeals for the purpose of having the judgment in the case at bar reviewed.

It is respectfully submitted that in view of the Chase Case, which has been followed in *United States* v. *King* (164 U. S., 703), the first question presented by the circuit court of appeals should be answered in the affirmative.

SECOND QUESTION.

> Did the act of July 31, 1894, above referred to, *ex propri vigore*, create a vacancy in the office of clerk of the circuit court for the eastern district of Michigan by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals of the sixth circuit?

The act of July 31, 1894, section 2 (2 Supp. R. S., 212), provides that—

> No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.

It will be observed that the act states that no person who holds an office the compensation of which amounts to the sum of $2,500 shall hold any other office. The language is clear and unequivocal. The only persons excepted from this mandatory provision are the retired

officers of the Army and Navy. No one else can by any reasonable inference be included within this exception, and if it had been the purpose of Congress to except clerks of the circuit and district courts and of the circuit courts of appeals from this inhibition it would have been easy to have said so in express terms.

It seems clear that the familiar maxim of *expressio unius exclusio alterius* applies here with full force, and that the exceptions must necessarily be limited to those specified, viz, retired officers of the Army and Navy.

Any doubt that may have existed as to the power of Congress to enlarge, limit, and repeal the authorities of public officers was settled early in the history of this country. In the famous *Dartmouth College Case* (4 Wheat., 518, 693), Chief Justice Marshall said:

> It is admitted, that the State legislatures have power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the States respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract that they shall always during their continuance in office exercise such authorities. They are to exercise them only during the good pleasure of the legislature.

The salary of the chief justice and associate justices of the territorial courts was fixed at $3,000 by Revised Statutes, section 1879, and continued to be at that rate until March 3, 1877, when Congress appropriated for full compensation for each of said justices the sum of $2,600, which provision was continued in the subsequent acts. The chief justice of the territory of Wyoming brought

suit in the Court of Claims for the difference between the amount appropriated and the salary provided in the act of June 17, 1870. A decision was rendered in favor of the plaintiff by a divided court, which upon appeal to this court (*U. S.* v. *Fisher*, 109 U. S., 143, 145) was reversed, with directions to dismiss the petition. The court, among other things, said:

> We can not concur in this view. The act of June 17, 1870, fixing the annual salary of appellee at $3,000, was not a contract that the salary should not be reduced during his term of office. (*Butler* v. *Pennsylvania*, 10 How., 402.) Nor was there any provision of the Constitution which forbade a reduction. (*Clinton* v. *Engelbrecht*, 13 Wallace, 434.) Congress, therefore, could without the violation of any contract reduce the salary of appellee, and had the constitutional power to do so.

In the case of *Butler* v. *Pennsylvania* (10 How., 402, 415) it was contended that under the act of the legislature of the State of Pennsylvania canal commissioners appointed for a period of one year should receive a per diem of $4, and that the appointment of such commissioners under the law was a positive obligation or a contract on the part of the State to employ them for the entire period and for the stipulated amount per diem, and that a subsequent act changing the tenure and reducing the compensation was a violation of such contract and therefore an infraction of section 10 of article 1 of the constitution. The court in overruling the contention of the appellant, said:

> The selection of officers, who are nothing more than agents for the effectuating of such public purposes,

is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them after the measures which brought them into being shall have been found useless, shall have been fulfilled or shall have been abrogated, as even detrimental to the well-being of the public.

* * * * *

It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws, and *to create and change or discontinue the agents* designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community (p. 438).

* * * * *

We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled and are called upon to foster and promote the general good; functions, therefore, which governments can not be presumed to have surrendered, if indeed they can, under any circumstances, be justified in surrendering them.

In line with the foregoing is the case of *Newton* v. *Commissioners* (100 U. S., 548, 559), wherein certain terms

and conditions required to be performed by the authorities of Canfield, Ohio, under the act of February 16, 1846, in order that the county seat should be "permanently established" at that town were carried out and the county seat established accordingly. Subsequently the legislature provided for the removal of the county seat to Youngstown, and proceedings were instituted to enjoin the same upon the ground that what had been done under the earlier act constituted an executed contract which bound the State, and the steps taken pursuant to the latter act impaired the obligation of that contract, and were therefore in violation of the contract clause of the Constitution of the United States.

The court said:

> The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure *create or abolish them or modify their duties.* It may also shorten or lengthen the term or service. And it may increase or diminish the salary, or change the mode of compensation. (*Butler et al.* v. *Pennsylvania*, 10 How., 402.)
>
> The police power in the States, and that with respect to municipal corporations, and to many other things that might be named are of the same absolute character. (Cooley, Const. Lim., 232, 342; *The Regents* v. *Williams*, 4 Gill & J., 321.) In all these cases there can be no contract and no irrepealable law, because they are "governmental subjects," and hence within the category before stated.
>
> They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its

> predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil (p. 559).

The appellant in the case of *Crenshaw* v. *United States* (134 U. S., 99) was discharged from the Navy under the act of August 5, 1882 (22 Stat. L., 284), which provided that in case of a surplus of graduates, they should be discharged. Appellant contended that by accepting the appointment he became entitled to the benefits of section 1229 and article 36 of section 1624, Revised Statutes, and that such acceptance entitled him to the office for life, unless removed by sentence of a court-martial; in other words, that he had a vested interest or contract right in his office of which he could not be deprived by Congress. In deciding that the appellant had no cause of action, the court said:

> The great question of protection to contract rights and vested interests, which forms such an interesting and important feature of our constitutional law, is not dominated by the turn of a phrase. Our courts, both State and national, look on these questions through the form to the substance of things; and, in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. What-

> ever the form of the statute, the officer under it does not hold by contract. He enjoys the privilege, revocable by the sovereignty at will; and one legislature can not deprive its successor of the power of revocation (p. 108).

If this right of removal exists with reference to army and naval officers whose term is by express statute substantially made for life, it applies *a fortiori* to the case of a civil officer whose term at most is but during the grace of the court whose creature he is.

In line with the foregoing may be cited many decisions of State courts holding substantially the same views, many of which are referred to in the case of Crenshaw, *supra.;* also Throop on Public Officers, section 19.

The courts have also held that the legislature may declare an office vacant, and in so doing it would not be an abridgment of a contract in the sense of section 10 of article 1 of the Constitution. (*People* v. *Van Gaskin*, 5 Mont., 352; *Denver* v. *Hobart*, 10 Nev., 28.)

Numerous cases may be cited sustaining the proposition that where two offices are forbidden to be held at the same time by the same person, the acceptance of the second vacates the first, among which are the following:

Foltz v. *Kerlin*, 105 Ind., 221.
People v. *Nostrand*, 46 N. Y., 375.
Davenport v. *Mayor*, 67 N. Y., 456.
People v. *Brooklyn*, 77 N. Y., 503.
Stubbs v. *Lee*, 64 Me., 195.
People v. *Leonard*, 73 Cal., 230.

The continuance in office by Harsha as clerk of the circuit court of appeals and his demanding and receiving the compensation as such, had substantially the same

legal effect as if after the passage of the act of July 31, Harsha while holding the office of clerk of the circuit court had received and accepted the office of clerk of the circuit court of appeals.

It is respectfully submitted that the second question should be answered in the affirmative.

THIRD QUESTION.

> Does the general rule that officers *de facto* may not recover by suit compensation for services rendered as such apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power under a *bona fide* claim of title to the office when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formally to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification?

A.

If the position of the Government is well taken in the discussion of the preceding question, that a vacancy occurred in the office of clerk of the circuit court for the eastern district of Michigan after the passage of the act of July 31, 1894, then it is contended, on behalf of the Government, that Harsha, having been divested of the emblems of office, he could not become reinvested without a reappointment. The mere fact of his subsequently performing the duties of the office after becoming lawfully qualified was not sufficient to restore him to his

former position without some overt act on the part of the appointing power.

It can not be disputed at this late day that one who ceases to be an officer, either by reason of a dismissal or resignation, can not be reinstated except in the manner provided by law for filling such position, and that neither the revocation of the order of removal nor the withdrawal of the acceptance of the resignation will *ipso facto* restore such officer to his former position.

Blake v. *United States*, 103 U. S., 227.
Mimmack v. *United States*, 97 U. S., 426.
Bennett v. *United States*, 19 C. Cls., 379.
12 Op. A. G., 555.

In the case of *Blake* v. *United States* (*supra*) the appellant's resignation as an officer in the Army was accepted in 1869; in 1878 he was reappointed. The President in his order of reinstatement said that as "Chaplain Blake was insane at the time he tendered his resignation, it is held that such resignation was and is void, and the acceptance thereof is set aside." The question of the right to receive pay for the period between the date of removal and the reappointment "is not decided, but is left for the decision of the court." The Supreme Court, in passing on the right of Blake to recover compensation for this period, say: "He was, consequently, not entitled to pay as post chaplain after July 2, 1870, from which day his successor took rank. Having ceased to be an officer in the Army, he could not again become post chaplain except upon a new appointment, by and with the advice and consent of the Senate."

In line with the Blake Case, and cited with approval therein, is the case of *Mimmack* v. *United States* (97

U. S., 426), wherein this court held that, although the President issued an order revoking his acceptance of the resignation of an army officer, such revocation did not operate to restore such officer to the service, and that he could not recover compensation for the period after such revocation (p. 438).

In the case of *Bennett* v. *United States* (19 C. Cls. R., 379) the court held, on the authority of the Mimmack Case, that a valid and unconditional acceptance of a resignation, accompanied by a proper notification, operated to remove an officer from the military service, and nothing short of a new appointment could effect a restoration. The same court, in the case of *Palen* v. *United States* (19 C. Cls. R., 389), say where an order had been made mustering an officer out of the Army the President is without power to revoke such order of dismissal or restore the officer except upon the advice and consent of the Senate.

State courts have held, in line with these decisions, that the unqualified resignation of an officer, which has been received by the proper authorities, becomes complete and effectual, and can not be recalled and the office resumed by such officer without a reappointment.

State ex rel. William B. Fitts, 49 Ala., 402.
Bunting v. *Willis*, 27 Grat., 144.
Pace v. *People*, 50 Ill., 432.
State v. *Hauss*, 43 Ind., 105.

B.

Harsha having been divested of his office by the act of July 31, in order to reinvest him therewith something

more was required than a mere tacit understanding between himself and the court that he should continue to act as such clerk, and some action was necessary on the part of the appointing power.

In the case of *Shell* v. *Cousins et al.* (77 Va., 328, 331) a sheriff holding office under the Virginia constitution accepted a second office, although the constitution says, "sheriffs shall hold no other office." The court held:

> The record shows that the office of sampler of tobacco was actually held and afterwards upon the institution of proceedings against him actually resigned in the most formal way by a letter to the governor. * * *
>
> It was the acceptance of the incompatible office and holding the same for even so brief a space of time that forfeited the first office, and, as we have seen above, created an actual vacancy in the same without any proceedings to remove him whatever, by *quo warranto* or otherwise; and if the office was thus vacant and he absolutely out of it, he could in no manner affect the first office by what he did with the second, since resigning one office could not put a party in an office nor could it restore him to one he had actually vacated. And if the office of sheriff was vacant it was the duty of the judge under the law to fill such vacancy in the mode prescribed by law.

This decision was in line with *Commonwealth* v. *Sherrard* (4 Leigh, 643), wherein the court held that the acceptance of the office of postmaster by a person holding the office of justice of the peace operated to vacate the latter office, notwithstanding the fact that he had

resigned the former before the prosecution commenced, and said further:

> It is of no consequence that the defendant had resigned that office before this prosecution was commenced, for by the acceptance of it his commission as a justice was absolutely vacated, and he became forever disqualified to act as such unless under the authority of a new commission.

C.

Under section 794, Revised Statutes, the clerk of a circuit court or a district court "shall, before he enters upon the execution of his office, take an oath or affirmation." This provision is mandatory and can not be waived. The claimant has persistently refused to take such oath. It is true that for his original appointment as such clerk he took the necessary oath, but can it seriously be contended than an oath of office once taken is good for any number of subsequent terms of office? After Harsha's office expired by virtue of the act of July 31, in order to reinvest himself therewith it became necessary for him to requalify by taking the oath prescribed by the statute. If Harsha's original oath is sufficient to qualify him for a second employment, then it may as well be said that it is unnecessary for a Congressman, district attorney, or marshal to make a new oath upon his reelection or reappointment.

In Throop on Public Officers, section 175, it is said that "an officer who has failed to take the official oath, as required by the statute, before entering upon the duties of his office, can not have the salary attached to

the office," citing *Thomas* v. *Owens* (4 Md., 189); *Philadelphia* v. *Given* (60 Penn. St., 136).

As sustaining this principle see also *Williams* v. *United States* (23 C. Cls. R., 46).

The constitution of Maryland provides that every person elected or appointed to any office under it shall take the oath therein prescribed before he shall enter upon the duties of such office. In the case of *Thomas* v. *Owens* (4 Md., 189), the court held, with reference to an officer who failed to take such oath:

> After his election and commission by the governor he had the right to invest himself with the powers and entitle himself to the salary by qualifying in the manner pointed out by the constitution; but until he actually did qualify he was no more comptroller than any other citizen, his qualification being an indispensable prerequisite to his investiture with the authority and responsibilities of the office (p. 220).

D.

Appellee not only failed to take the statutory oath, but he also failed to give a new bond, as required by section 3, 1 Supplement Revised Statutes, 65, which provides:

> That the clerks of the Supreme Court and the circuit and district courts, respectively, shall each, before he enters upon the execution of his office, give bond with sufficient sureties. * * *

Harsha ceased to have office as clerk of the circuit court of the United States after July 31, and the obligations of the bond ceased with the settlement of his accounts for the term of office for which given. For every reappointment or new office a new bond would

necessarily be required. Under no condition, without requalifying, can the old sureties be held responsible under the new appointment. In the case of *Williams* v. *United States* (23 C. Cls. R., 46) the claimant was duly nominated as consul-general to Haiti and took the oath of office, but failed to give the necessary bond as a condition precedent to entering upon the duties of the office. The principle that the bond is an essential thing to qualify for office is the same in that case as in the case at bar, and in dismissing it the court say:

> In our opinion, claimant was never fully invested with the office of minister resident and consul-general to Haiti. To use a familiar expression, he failed to qualify for the office, and is therefore not entitled to the salary (p. 53).

In the *City of Philadelphia* v. *Given* (60 Pa. St., 136), it appears that the defendant was returned by the judges of election in October, 1865, as elected city commissioner of Philadelphia for a term of three years from January 1, 1866. By an act of the general assembly it was provided that city commissioners, before entering upon the duties of their office, should give a bond to be provided, etc., but Given failed to execute and deliver such bond. The court held:

> The performance of the duties of the officer before giving the security was prohibited by law. The law must therefore refuse to aid him in compelling payment for services thus rendered against its directions. Citing *Commonwealth* v. *Slifer* (1 Casey, 23).

In the case of *Winneshiek County* v. *Maynard et al.* (44 Iowa, 15), the court held:

> The obligation of a surety is, however, *strictissimi juris*. He can not be held liable upon a contract on

> the plea that it is substantially the same or less onerous. This proposition admits of no controversy.
>
> * * * * *
>
> If Maynard had qualified in pursuance of his election and resigned, it would hardly be claimed that the bond could be tided over a vacancy and revived under an appointment.
>
> On the occurrence of the vacancy, then the sureties had a right to assume that they were no longer liable, and although Maynard was afterwards appointed, they had a right to assume that they had no occasion to examine his accounts while in office or take measures to protect themselves against his defalcations after his office had expired.

In *United States* v. *Nicholl* (12 Wheat., 505, 509) it was held that the sureties were not responsible on their official bond for moneys received by their principal as navy agent after the legal termination of his office. In line with the foregoing is the case of *Bryan* v. *United States* (1 Blatch., 141, 149), wherein the court held that in order to hold the sureties on an officer's bond it must appear that the moneys came in the principal's hands, either in point of fact or in judgment of law, previous to the time when the term of office expired.

This court in *United States* v. *Le Baron* (19 How., 73, 78), held:

> When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall

> enter on the possession of the office under his appointment. These acts, then, become conditions precedent to the complete investiture of the office.

This was followed by the case of *Dainese* v. *United States* (15 C. Cls. R., 64).

Harsha having retired from the office of clerk by virtue of the act of July 31, as a condition precedent to his reentering upon the duties of the office it became necessary for him to give the bond as required under section 3 of the act of February 22, 1875 (1 Supp. R. S., 65), and having failed to do so, he was not, therefore, legally in office.

E.

Appointments of clerks of circuit courts is by law vested in the circuit judges of the respective circuits under section 3, 1 Supplement Revised Statutes, 639. Both by custom and the accepted law such appointments are made and should be made in writing.

The question as to the necessity of an appointment on the part of the appointing power in order to install into office is very thoroughly discussed in *People* v. *Murray et al.* (70 N. Y., 521). In that case, after citing *Marbury* v. *Madison* (1 Cranch, 137), the court said:

> It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged, did or could be made to depend upon the verbal declarations and statements of the person having the power to make the appointment, to be proved by parole and liable to be forgotten, misunderstood, or misreported, subject to all the contingencies and infirmities which are incident

to verbal evidence or evidence by parole, so pregnant of mischief and misfortune as to have led to the enactment of the Statute of Frauds (p. 524).

* * * * *

But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally and without writing when permitted by the terms of the statute conferring the power. Affecting the public, and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should be authenticated in a way that the public may know when and in what manner the duty has been performed (p. 525).

* * * * *

The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed, and that is the signing of the writing or the commission. The appointment is then, and not before, evidenced by an open unequivocal act. Chief Justice Marshall, in *Marbury* v. *Madison* (*supra*), says: "Some point of time must be taken when the power of the Executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission." It is not discretionary with a person having the power to appoint to office whether there shall be a commission. The signing of the commission is an integral part of the duty of the delegated power, and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office (p. 526).

F.

The principle that salary and fees are incident to the title to an office and that a de facto officer can not recover has become well settled. The principle is sustained in the following, as well as many other authorities:

2 Kent's Com., 295.
Riddle v. *County of Bedford*, 7 Serg. & R., 386.
Bowman v. *State Treasurer*, 25 Pa., 23.
Philadelphia v. *Given*, 60 Pa., 136.
Dorsey v. *Smyth*, 28 Cal., 21.
People v. *Potter*, 63 Cal., 127.
Matthews v. *Supervisors*, 53 Miss., 715.
Bennett v. *United States*, 19 C. Cls., 379.
Dainese v. *United States*, 15 C. Cls., 64.
Dolliver v. *Parks*, 136 Mass., 499.
Mechem on Public Officers, section 331.
Throop on Public Officers, section 661.

In *Bennett* v. *United States* (19 C. Cls. R., 379, 386) the court, in adhering to the decisions in the cases of *Kilburn* (15 C. Cls. R., 47); *Collins* (15 id., 34); *Burchard* (19 id., 137), and *Young* (19 ib., 145), held that neither the President alone, nor the President with the advice and consent of the Senate, can give a retroactive effect to the appointment of an officer by antedating the appointment, so as to entitle him to the emoluments of the office, prior to the time of his actual appointment, except where such a course is expressly authorized by law. They further hold upon the question of the right of the claimant to recover pay for the period in which he was to all intents and purposes a de facto officer, that the Treasury Department having paid such officer without

considering his title to the office de jure, that "had he sued for his pay it would have been necessary for him to show a good title to the office the salary of which he claimed."

In the case of *Dainese* v. *United States* (15 C. Cls. R., 64, 79) the Court of Claims held that a consul or vice-consul having failed to give the bond required by law, "he was not invested with either office so as to entitle him to recover any salary which may have been attached to it, even if motives of public policy should induce an executive department or a court to give validity to his official acts."

In *Mimmack* v. *United States* (97 U. S., 426) this court held that notwithstanding the fact that the President had revoked his acceptance of an officer's resignation, such revocation did not operate to restore such officer to the service, and that he could not recover compensation for the period after such revocation.

It is respectfully submitted that the third question presented by the circuit court of appeals should also be answered in the affirmative.

L. A. PRADT,
Assistant Attorney-General.
E. C. BRANDENBURG.

No. 127.

Y. of Conely for D. C.

SUPREME COURT OF THE UNITED STATES.

Filed Sept. 15, 1898.

Office Supreme Court, U. S.
FILED
SEP 15 1898
JAMES H. McKENNEY,
CLERK.

UNITED STATES,
Plaintiff in Error,
vs.
TER S. HARSHA.

No. 903. 127.

BRIEF FOR MR. HARSHA.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.,
1898.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

THE UNITED STATES,
Plaintiff in Error,
vs.
WALTER S. HARSHA.

No. 401.

BRIEF FOR MR. HARSHA.

STATEMENT.

Mr. Harsha, for many years, had been the clerk—*de jure et de facto*—of the Circuit Court of the United States for the Eastern District of Michigan, having been duly appointed to that office June 6, 1882.

On June 16, 1891, he was appointed clerk of the Circuit Court of Appeals, Sixth Circuit, and was the first person to hold that office.

After his acceptance of the latter appointment, some question was made by the Comptroller of the Treasury concerning Mr. Harsha's right to retain the office of clerk of the Circuit Court and to receive the emoluments of it. The matters in difference took the form of litigation, and were finally heard and determined by the Court of Appeals in 1893.

The Court held:

1. That Mr. Harsha had not vacated his office within the meaning of the Act of Congress of June 20, 1874, § 2 (18 Stat., 109), by accepting the position of the clerk of the Circuit Court of Appeals.

2. That the question of his right to the office of clerk of a circuit court, and to the compensation belonging thereto, could not be determined by the auditing of his account in the Treasury Department.

3. That Rev. Stat., § 1763, did not prohibit him, though receiving $3,000 per annum as clerk of the Circuit Court of Appeals, from receiving further compensation as clerk of the Circuit Court when he lawfully held both offices.

United States vs. Harsha, 56 Fed. Rep., 953, s. c. 6 C. C. A. Rep., 178.

When Mr. Harsha, on June 6, 1882, was appointed clerk of the Circuit Court, he took the oath of office, filed his official bond in the sum of twenty thousand dollars, and entered upon the discharge of the duties of the office.

From the date of his induction into the office to the very moment of this writing, he has been acting continuously and uninterruptedly under his appointment by the judges of the Circuit Court, and with their continued assent and approval, under a *bona fide* claim of title to the office. *No other person had or made any claim of title to the place.*

Record, p. 1.

During this same period of time he has performed fully and faithfully all of the duties and all the services that could be lawfully required or expected of the clerk of the Circuit Court, and the United States, the Court, and all suitors therein have received the full benefit of the same.

Record, p. 1.

When he was appointed clerk of the United States Circuit Court of Appeals, for the Sixth Circuit, on June 16, 1891, he took the oath of office, filed his official bond in the sum of twenty thousand dollars, and entered upon the discharge of the duties of that office. He performed the duties required of the clerk of the Court of Appeals and received salary therefor at the rate of three thousand dollars per annum, until October 2, 1894, when his resignation, delivered to the judges of the Court of Appeals on February 24, 1894, was accepted.

Record, p. 1.

When Mr. Harsha presented his resignation to the judges of the Circuit Court of Appeals, the Act of June 20, 1874, above cited, was in force, and he was in lawful possession of both offices and entitled to all lawful compensation to be derived therefrom.

Having performed the duties of the office of clerk of the Circuit Court, as above narrated, continuously, and without question by any representative of the United States having authority to question his right to perform the duties of the office, Mr. Harsha prepared and presented his account to the Treasury Department in the usual course and manner. He was then advised by the Comptroller of the Treasury that he was not entitled to any compensation whatever for anything done by him as clerk of the Circuit Court of the United States for the Eastern District of Michigan, after July 31, 1894, and was referred to the Act of Congress of that date containing the following provision:

"No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached

unless specially heretofore or hereafter specially authorized thereto by law."

28 Statutes at Large, 206.

It is a little peculiar that a permanent regulation of this sort should be hidden under the verbiage of a temporary appropriation bill, where no one would suspect its presence; but, as the Constitution of the United States (unlike many State Constitutions) does not prohibit this manner of legislating, I suppose that it can only be criticised, not condemned. It reminds me of a search which I made something like twenty-five years ago for the provision repealing the statute requiring bank checks to bear a two-cent stamp, and, after a long and tedious examination, I discovered it in an Act of Congress regulating the import duties on canned fish and the like.

And it is not surprising that the above quoted provision escaped the notice of not only Mr. Harsha, but also of the judges of the Circuit Court, and the judges of the Circuit Court of Appeals.

Mr. Harsha has not received any formal appointment to the office of clerk of the Circuit Court since October 2, 1894 (the date of the acceptance of his resignation of the office of the clerk of the Circuit Court of Appeals), and the Comptroller of the Treasury makes that fact and the Act of July 21, 1894, his justification for withholding from Mr. Harsha all compensation for services rendered from the last mentioned date to the present time.

Whether the Comptroller will supplement his refusal of compensation with a demand for an accounting for all moneys received by Mr. Harsha for personal services rendered litigants in connection with his office, remains to be seen.

At present the Comptroller's position is as follows:

1. Mr. Harsha's account prior to July 31, 1894, may be allowed.

2. His account from July 31, 1894, to and including October 2, 1894, should be rejected.

3. His account subsequent to October 2, 1894, should be rejected.

At the hearing of this cause in the Circuit Court, Judge Severens ruled as follows:

1. Mr. Harsha's account prior to July 31, 1894, is allowed.

2. His account from July 31, 1894, to October 2, 1894, is disallowed.

3. His account subsequent to October 2, 1894, is allowed.

The United States claims error in the allowance of any portion of Mr. Harsha's account subsequent to July 31, 1894.

Mr. Harsha claims error in the disallowance of his account from July 31, 1894, to October 2, 1894.

Both parties sought relief in the Court of Appeals, and by that Court the case is certified to this Court.

Three questions are presented:

ARGUMENT.

FIRST QUESTION.

Can such a judgment, rendered under the act of March 3, 1887, in the Circuit or District Court, be brought before this Court for review in any other mode than as provided in Section 707 of the Revised Statutes for the review by the Supreme Court, of judgments of the Court of Claims, to-wit, by appeal?

Record, p. 2.

1. The point suggested by this question was not raised when the case was argued in the Court of Appeals. In

that court, counsel assumed that the appellate proceedings were lawful and regular, and the Court made no observation about the matter.

2. Both parties sought relief in the Court of Appeals. It would hardly be candid on the part of counsel for Mr. Harsha, to insist that a negative answer should be given to the above question.

3. Personally, I think that the considerations offered by the counsel for the United States, in discussing this question, justify an affirmative answer, and I will not repeat his argument.

SECOND QUESTION.

Did the Act of July 31, 1894, above referred to, ex proprio vigore, create a vacancy in the office of clerk of the Circuit Court for the Eastern District of Michigan, by reason of the fact that, at the time of its taking effect, the then lawful incumbent of that office was also holding the office of clerk of the Circuit Court of Appeals for the Sixth Circuit?

I submit that this question should be answered in the negative.

The learned counsel for the United States, discussing the statute under consideration, says: "The language is clear and unequivocal."

This is true. But it is no clearer and no less equivocal than many other legislative enactments, which have required judicial interpretation in order to effectuate the legislative intent in a practical, rational manner.

It is true that, under some circumstances, where the language is explicit and the intent manifest, it is sufficient to say *Ita lex scripta est.*

But it is not often that even a statutory rule is applied according to the letter rather than the spirit. Common

law rules often bend to the circumstances of the particular case, and statutory enactments are construed so as not to work injustice, wrong or oppression.

Even in the interpretation of constitutional provisions, the mere letter of the law is not always followed.

These considerations, it seems to me, should be borne in mind in construing the act of July 31, 1894.

1. Does not the act of July 31, 1894, operate prospectively?

Is not the proper interpretation of it that it prohibits after the passage of the act, anyone from making the appointment, and, if appointed, the appointee from holding the particular office?

Ordinarily, at least, a statute will be construed to operate prospectively, unless it plainly appears that it is intended to operate retrospectively or to change existing conditions.

It is no answer to this suggestion to say that Congress has the power to make the act operate otherwise than prospectively. The question is not one of authority, but of intention, ascertained by statutory construction according to judicial rules.

Nor are we aided in reaching a correct conclusion by the suggestion that Mr. Harsha's title to the office had none of the essentials of a vested right. He may not have had an irrevocable title and yet it may be that Congress did not intend to vacate the office which he lawfully held at the time of the adoption of the Act of July 31, 1894, or, so intending, may not have used apt language to accomplish the desired result.

Nor is it inconsistent with the claim that this statute shall operate only upon appointments made after the act, that the words, "unless specially heretofore or hereafter specially authorized thereto by law," are used. That language applies as well under one construction as

another, and simply excepts from the operation of the act, whichever way it operates, all officers having the requisite special sanction.

I understand it to be the rule that where it is doubtful whether appropriate language has been used to justify any construction other than that giving prospective operation, such operation only will be given.

Doubt of the legislative intent is not necessarily removed by the fact that the language used in the statute is simple and positive. Doubt often arises when facts are presented which seem to make it unreasonable, unjust or oppressive to apply the statute literally.

I think that some force is lent to the suggestions here offered by the language used in the act.

If Congress had intended to vacate existing offices, by the mere force of the language used, it seems to me that the legislative will would have been expressed, if not in different language from that used in the act, at least by the omission of the words, "be appointed to or." The fact that Congress uses the word words "be appointed to," before and in connection with the expression "or hold any other office," would seem to indicate that the act was intended to apply to cases of appointment subsequent to the passage of the statute, and that the later words, "or hold any other office," simply energize the legislative expression, without giving the act a retrospective operation.

2. It would not be just or proper to belittle the Congress of the United States by claiming that the legislation under consideration was intended to reach a particular case.

Nor do I think it fair to argue that Congress, by the Act of July 31, 1894, sought to vacate one set of offices rather than another, by what would amount to a mere fiat.

If a person, not an incumbent of an office, were tendered two appointments, both of which he could not lawfully hold at the same time, he certainly would have the option of accepting one or the other.

So, too, if the incumbent of an office, yielding a salary of twenty-five hundred dollars per annum, were tendered another office, he would have the right to reject, or accept with the consequences.

Did Congress intend to discriminate in this particular against those who at the time of the passage of the act, happened to hold two offices, one of which afforded the compensation mentioned in the statute? It seems to me that no such difference of treatment was contemplated.

Suppose, at the time the act of July 31, 1894, went into operation, Mr. Harsha had held two offices, each of which afforded him the annual salary or compensation of twenty-five hundred dollars? Who can say, in the absence of some act on the part of Mr. Harsha, which office was vacated? Yet in terms, the act of July 31, 1894, would apply as well to such a case as to that of a person holding two offices, one of which afforded a salary of twenty-five hundred dollars per annum, and the other an uncertain amount of fees? And *non constat* that in the present instance, the office which afforded fees was not better, all things being considered, than that which afforded a salary.

of removal whenever it sees fit so to do.

It may be unnecessary to discuss at length this feature of the case, but I regard the point as worthy of consideration, and submit it.

All that I have said thus far, however, leads to this:

(a) That Congress did not intend that this act should

affect persons already lawfully in office at the time of the passage of the act, or

(b) That a person lawfully holding two offices at the time of the enactment of the statute, at the most, would be obliged to elect or choose the office which he would retain.

Hence, the act of July 31, 1894, did not *ex proprio vigore*, create a vacancy in the office of clerk of the Circuit Court for the Eastern District of Michigan, but provided that the incumbent of the office (if the statute applies to his case), would have imposed upon him the option and duty of choosing which office he would retain.

This seems to me a just and reasonable interpretation of the statute under consideration, and the proper answer to the second question submitted by the Court of Appeals.

THIRD QUESTION.

Does the general rule that officers de facto may not recover by suit, compensation for services rendered as such, apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power under a bona fide claim of title to the office, when no other person has at any time, made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal re-appointment, and a failure on the part of the incumbent formally to re-qualify after a technical vacation of the office originally held by him under a valid appointment and qualification?

To discuss this question academically, will aid neither the Court nor the defendant in error.

The facts of the particular case are so peculiar that, in my judgment, the matter cannot be properly determined

unless Mr. Harsha's situation and action are thoroughly understood and appreciated.

On July 30, 1894, Mr. Harsha was clerk of the Circuit Court for the Eastern District of Michigan and clerk of the Court of Appeals. He was actually and lawfully discharging the duties of both offices.

His relations with those offices at that time, however, were not precisely the same.

Prior to that date, to-wit, on February 24, 1894, he had presented his resignation of the office of clerk of the Court of Appeals to the judges of that court.

So far as Mr. Harsha was concerned, he had resigned the office and simply awaited a successor to whom he could surrender whatever governmental authority and governmental property he at the time possessed.

It will be noted, and, I trust, borne in mind, that Mr. Harsha resigned, so far as he was concerned, the office of clerk of the Court of Appeals *before* the Act of July 31, 1894, was passed.

I call especial attention to this fact because, whether Mr. Harsha, after the Act of July 31, 1894, went into effect, had the right to choose which office he would retain, he exercised that choice prior to the last-mentioned date, and at a time when the law unquestionably gave him the right to retire from either and hold the other. Mr. Harsha never withdrew his resignation of the office of clerk of the Court of Appeals, and the judges of that court thoroughly understood that he was simply remaining as a *de facto* incumbent, so to speak, for their convenience, and the benefit of the United States.

The judges of the Court of Appeals accepted Mr. Harsha's resignation and appointed his successor on October 2, 1894, until which time Mr. Harsha remained in the occupancy of the office, and performed the duties appertaining to the same.

As no question can be made of Mr. Harsha's good faith, the following should be taken as established:

(a) That he did not intend to abandon and never did abandon the office of clerk of the Circuit Court for the Eastern District of Michigan.

(b) That he did intend to surrender the office of clerk of the Court of Appeals, and had actually resigned it before the statute of July 31, 1894, was passed.

(c) That he did all that he could and should have done to make his intent and act effective.

At this time, Congress had made no provision for a deputy clerk or assistant clerk, or any other person to whom Mr. Harsha could have surrendered the office and official property.

It is true, as a matter of fact, that Mr. Harsha could have walked out, turned the key in the door, and left the records, files and other official property without custodian or protection; but was it his duty to do so, as a matter of law, in order that he should not be held to have retained the office of clerk of the Court of Appeals?

Can it be said, with reason and good sense, that under the circumstances of this case, the United States expected that Mr. Harsha would abandon his post and leave unprotected, the office, records and files of the court, important documents and other property, public and private, close the court to suitors and their representatives, and generally suspend the clerical administration of the Court of Appeals?

Mr. Harsha, as clerk of the Court of Appeals, had given an official bond, conditioned expressly or impliedly, that he would safely keep and deliver to his successor, the official property in his hands or under his control. When the act of Congress went into effect on July 31, 1894, he was in the lawful possession of the office, and of all of the property of the United States appertaining to it. It was

his duty to retain such possession and make suitable transfer to his successor. This he certainly could not do until his successor was appointed.

I think that it may be taken for granted:

(a) That Congress did not intend to abolish the office of the clerk of the Court of Appeals.

(b) That Congress did not intend to obstruct, embarrass or confuse the administration of the affairs of that court.

In this instance, no other person claimed the office of clerk of the Court of Appeals. No other person had the right to it. The United States raised no question and made no complaint. They who were *pro hac vice* the United States, must be taken as having desired Mr. Harsha to remain temporarily.

Whatever Mr. Harsha did was for the benefit of the United States, and, had another person performed the services, the compensation would have been the same.

Mr. Harsha did not resign the office of clerk of the Circuit Court for the Eastern District of Michigan, but continued to hold that office and perform the duties thereof with the knowledge and assent of the judges of that court.

True, he performed provisionally, with the approval of the judges of that court, the duties of the office of clerk of the Circuit Court of Appeals. It is, by this act, says the Comptroller, that Mr. Harsha vacated the office of clerk of the Circuit Court for the Eastern District of Michigan, though neither he nor the judges expected or intended any such result. But what Mr. Harsha did in the matter of making an election, and what he did in respect of the office of clerk of the Court of Appeals *ad interim*, were entirely satisfactory to the Circuit Court for the Eastern District of Michigan, and the judges thereof.

The judicial branch of the Federal Government must be understood as having recognized Mr. Harsha's election to

retain the office of clerk of the Circuit Court, and as having approved his retention of that office, under the circumstances of this case.

The unbroken continuity of his administration of the affairs of the office of clerk of the Circuit Court for the Eastern District of Michigan can be accounted for in no other way.

Mr. Harsha's resignation of the office of clerk of the Court of Appeals was in form accepted by the judges of that court, on October 2, 1894. Mr. Harsha certainly then became qualified to hold the office of clerk of the Circuit Court. The appointing power in the particular instance, was lodged in the judges of that court. They continued him in office. They approved his retention of it. They recognized his official acts, and gave full credit to them daily. According to law, they must have had a clerk, and according to the fact, they had no clerk but Mr. Harsha.

He held the office under color of the original appointment, in good faith, with the sanction and approval of the judges of that court.

Under the circumstances, this is tantamount to a reappointment (if such was necessary), and should be so regarded.

In the brief of counsel for the United States, it is said that the claimant persistently refused to take the oath of office.

Brief for the United States, p. 16.

There is nothing in the certificate of the judges of the Court of Appeals which justifies this remark, and the matter in difference between Mr. Harsha and the United States has never turned on this point.

Counsel for the United States also remark that both by custom and the accepted law, appointments are made and should be made in writing.

Brief for the United States, p. 20.

I am willing to concede that it is better to make an appointment by written instrument, but I deny that there was any law that required it in Mr. Harsha's case.

The attention of the Court is solicited to its recent decision and the opinion of Mr. Justice White, in the case of the *United States vs. Lewis A. Eaton*, decided February 28, 1898. It seems to me that that case goes far towards sustaining my contention in this case.

EDWIN F. CONELY,
Counsel for Mr. Harsha.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFF IN error,
v.
WALTER S. HARSHA. } No. 401.

MOTION TO ADVANCE.

Now comes the United States, by the Solicitor-General, and moves the court to advance the above-entitled cause to such early hearing as it may deem proper, and for reason therefor states that this is one of a number of suits brought on behalf of the defendant in error under the act of March 3, 1887 (24 Stats., 505), in all of which cases substantially the same question is involved, but in no instance has the amount in controversy in any one suit been sufficiently large to give the right of appeal.

The circuit court of appeals has time and again been called upon to pass upon the same question, and, to get an authoritative decision which will govern both claimant

and the accounting officers, it has seen fit to ask the instructions of this court upon the following questions:

First question:

Can such a judgment, rendered under the act of March 3, 1887, in the circuit or district court, be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal?

Second question:

Did the act of July 31, 1894, above referred to, ex proprio vigore create a vacancy in the office of clerk of the circuit court for the eastern district of Michigan by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals of the sixth circuit?

Third question:

Does the general rule that officers de facto may not recover by suit compensation for services rendered as such apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power under a bona fide claim of title to the office when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formerly to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification:

In addition to the foregoing, the question involved is one in which the Treasury Department is much interested, and which they have requested may be passed upon by this court.

The determination of these questions will govern other cases involving the same question, and early judgments in which cases the Government will be compelled to certify to Congress for appropriation. Hence the necessity for prompt action.

Respectfully submitted.

J. K. RICHARDS,
Solicitor-General.

UNITED STATES *v.* HARSHA.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 127. Submitted January 11, 1899. — Decided January 23, 1899.

A judgment of a Circuit or District Court of the United States for the plaintiff in an action at law under the act of March 3, 1887, c. 359, 24 Stat. 505, is reviewable by the Circuit Court of Appeals upon writ of error.

The provision of the act of July 31, 1894, c. 174, § 2, 28 Stat. 162, 205, that "no person who holds an office, the salary or annual compensation of which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached," does not, *ex proprio vigore*, create a vacancy in the office of clerk of a Circuit Court of the United States, by reason of the fact that at the time of its taking effect the then lawful incumbent of that office is also holding the office of clerk of the United States Circuit Court of Appeals in the same circuit, having previously resigned the latter office, and his resignation not having been accepted by the judges.

On May 24, 1897, the Circuit Court of Appeals for the Sixth Circuit, upon a writ of error from that court to review a judgment rendered by the District Court of the United States for the Eastern District of Michigan in favor of Walter S. Harsha in an action brought by him against the United States, under the act of March 3, 1887, c. 359, to recover fees as clerk of the Circuit Court of the United States for that district, for services rendered during the first quarter of the

year 1895, certified to this court the following statement of facts and questions of law:

"Walter S. Harsha was duly appointed clerk of the Circuit Court of the United States for the Eastern District of Michigan, June 6, 1882, took the oath of office and filed his official bond in the sum of $20,000 on the same day, and is now and has from that time until the present been continuously, under said appointment by the judges of said court, and with their continued assent and approval, acting as clerk of said court under a *bona fide* claim of title to said office, no other person having at any time made any claim of title thereto, nor has his title been otherwise questioned than as hereafter stated.

"The said Harsha is now, and has been continuously since his appointment as clerk, a permanent resident of the city of Detroit, in the Eastern District of Michigan, where his official duties as such clerk are to be performed, and has during the whole of said time, from June 6, 1882, to the date hereof, given his actual personal attention to such duties, and has not at any time removed from said district.

"The accounts of Harsha as such clerk, for the first quarter of the calendar year 1895, amounting to $482.90, were made, presented, proved and allowed by the Circuit Court of the United States for the Eastern District of Michigan, as provided by law; said accounts were for services actually rendered, and were correct, and were duly forwarded to the Attorney General for examination under his supervision, as provided by statute.

"The said Harsha was duly appointed clerk of the United States Circuit Court of Appeals for the Sixth Circuit, June 16, 1891, took his oath of office and filed his official bond in the sum of $20,000 on the same day, and continued to perform the duties of the office of clerk of said court from June 16, 1891, aforesaid, to and including October 2, 1894, and received salary as such clerk at the rate of $3000 per annum for that time.

"On February 24, 1894, Harsha presented to the judges of said Court of Appeals his resignation as such clerk, which resignation was accepted by said judges October 2, 1894.

Statement of the Case.

"Upon the presentation at the Treasury Department of the said accounts so forwarded to the Attorney General, the Comptroller of the Treasury, upon his construction of the act of Congress of July 31, 1894, decided that a vacancy occurred in the office of said clerk of the Circuit Court of the United States, beginning August 1, 1894, for the reason that after that date Harsha continued to hold the office of clerk of the United States Circuit Court of Appeals for the Sixth Circuit, the annual compensation of which office was $3000, and that such vacancy continued thereafter until the expiration of said first quarter of the calendar year 1895, and, upon the ground of such vacancy, disallowed the said accounts of petitioner as clerk of the United States Circuit Court for the Eastern District of Michigan for the said first quarter of the calendar year 1895.

"This action was brought by Harsha, to recover his fees earned as clerk of the Circuit Court, in the District Court of the United States for the Eastern District of Michigan, under the second section of the act of March 3, 1887, entitled 'An act to provide for the bringing of suits against the Government of the United States;' and after making a finding of facts and stating its conclusions of law, the District Court filed the same, and entered judgment for the petitioner Harsha in the sum of $482.90. The United States, by its attorney, then applied to the District Judge, holding the District Court, for the allowance of a writ of error from this court to the District Court. The writ was allowed, and was issued by the clerk of this court to the District Court.

"The instruction of the Supreme Court is respectfully requested on certain questions of law arising on the foregoing statement of facts as follows, to wit:

"First question. Can such a judgment rendered under the act of March 3, 1887, in the Circuit or District Court, be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal?

"Second question. Did the act of July 31, 1894, above re-

ferred to, *ex proprio vigore* create a vacancy in the office of clerk of the Circuit Court for the Eastern District of Michigan, by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the Circuit Court of Appeals of the Sixth Circuit?

"Third question. Does the general rule, that officers *de facto* may not recover by suit compensation for services rendered as such, apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power, under a *bona fide* claim of title to the office, when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formally to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification?"

Mr. Assistant Attorney General Pradt and *Mr. E. C. Brandenburg* for the United States.

Mr. Edwin F. Conely for Harsha.

Mr. Justice Gray delivered the opinion of the court.

This suit being an action at law under the act of March 3, 1887, c. 359, the judgment of the District Court therein was, as has been directly adjudged by this court, reviewable by the Circuit Court of Appeals upon writ of error. 24 Stat. 505; *Chase* v. *United States*, 155 U. S. 489; *United States* v. *King*, 164 U. S. 703. The first question certified must therefore be answered in the affirmative.

Mr. Harsha was appointed and qualified as clerk of the Circuit Court on June 6, 1882, and has ever since performed all his duties as such.

On June 16, 1891, he was appointed and qualified as clerk of the Circuit Court of Appeals. On February 24, 1894, he presented to the judges of that court his resignation of the

office of clerk thereof; and his resignation was accepted by them on October 2, 1894. From his appointment until the acceptance of his resignation he performed all the duties and received the salary of the clerk of that court.

In 1893, it was adjudged by the Circuit Court of Appeals, affirming a judgment of the Circuit Court, in an action brought by Mr. Harsha against the United States for services as clerk of the Circuit Court during the last half of 1891 and the first half of 1892, that his acceptance of the office and receipt of the salary as clerk of the Circuit Court of Appeals during that period did not vacate the office of clerk of the Circuit Court, or deprive him of the right to the compensation then sued for. *United States* v. *Harsha*, 16 U. S. App. 13.

The subject of the present suit is the right of Mr. Harsha to recover compensation for his services as clerk of the Circuit Court during the first quarter of the year 1895.

On July 31, 1894, Congress, by a provision inserted in the middle of a general appropriation act, and as an addition to a section relating to the pay of assistant messengers, firemen, watchmen, laborers and charwomen, enacted as follows: "No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached, unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army and Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate." Act of July 31, 1894, c. 174, § 2; 28 Stat. 162, 205.

The second question certified by the Circuit Court of Appeals to this court is whether this act, *ex proprio vigore*, created a vacancy in the office of clerk of the Circuit Court, "by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the Circuit Court of Appeals."

The provision of the act in question, so far as concerns the question now before this court, is simply this: "No per-

son who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation shall be attached." If the appointment to the other office were made after the passage of the act, it might well be held to be void, leaving the person in possession of the first office. But when, at the time of the passage of the act, a person is holding two offices, to each of which compensation is attached, and the compensation of either or both of which is by an annual salary, the act does not say which of the two offices he shall be deemed to have resigned, or which of the two he shall continue to hold. If the compensation of each office were a fixed salary of two thousand five hundred dollars or more, an election by the incumbent would be the only possible method of determining which office he should continue to hold. He must have the same right of election between the two offices, when one is paid by a fixed salary and the other by fees. The act, while it makes the two offices incompatible for the future, does not undertake to compel the defendant to give up the office which is paid by fees, when he prefers to hold that office and to give up the one which is paid by a salary.

At the time of the taking effect of the act, Mr. Harsha was actually holding under lawful appointments, and was performing the duties of, two offices, that of clerk of the Circuit Court, paid by fees, and that of clerk of the Circuit Court of Appeals, paid by a salary of three thousand dollars. He never showed any intention of resigning or abandoning the former office; and he had done all that he could to get rid of the latter office, by presenting his formal resignation thereof to the judges five months before the passage of the act, and never attempting to recall that resignation. Even if his resignation of this office could not take full effect until accepted, yet such resignation, coupled with his unequivocal intention to retain the other office, prevented the act of Congress from creating, of its own force, and independently of any action of his, a vacancy in that office. The fact that so long as his resignation of the one office had not been accepted, and while he

continued to perform the duties of both offices, he claimed the compensation attached to both — whether this was owing to his overlooking the provision in question, or to his own understanding of its effect — has no tendency to show that he elected to retain the office which he had resigned and to give up the other.

The second question certified must therefore be answered in the negative, and the third question becomes immaterial.

Ordered accordingly.